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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

Sarah T. Van Cleve and
Robert B. Van Cleve,

Petitioners,

v.

United States of America

Petion for a Writ of Certiorari to
Review Judgment of the United States
Court of Appeals for the Fifth Circuit

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Representing Herself

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SUPREME COURT OF THE UNITED STATES

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SARAH T. VAN CLEVE and
ROBERT B. VAN CLEVE,

Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May, 1981

QUESTIONS PRESENTED

The United States of America, on behalf of the Department of the Interior and the National Park Foundation, brought this condemnation action against petitioners and other persons owning land on Cumberland Island in Camden County, Georgia, pursuant to the Cumberland Island National Seashore Act, 16 U.S.C. §§ 459i et seq. The questions thereby arising are:

1. Whether the Court of Appeals erred in finding the Government's motion for summary judgment properly supported under Fed. R.Civ.P. 56(e) when the affidavits filed therewith were not made on the personal knowledge of the affiant.

2. Whether the Court of Appeals erred in concluding that petitioners had not shown any injury under the Fifth Amendment to the United States Constitution from the National Park Foundation's failure to contact them regarding the availability of a conveyance/

reservation of life estate deal before condemning their property.

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO REVIEW JUDGMENT OF THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Sarah T. Van Cleve and Robert B. Van Cleve pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on April 15, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. i - iii. The orders of the District Court for the Southern District of Georgia, Brunswick Division, are unreported, and appear at Appendix B, infra pp. iv - ix.

JURISDICTION

The order or judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 15, 1981. See Appendix A, infra, p. i. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

Constitution of the United States, Amendment V:

> "No person shall. . . be deprived of life, liberty, or property, without due process of law. . . ."

Cumberland Island National Seashore Act., 16 U.S.C. §§ 459i et seq.:

See Appendix C, infra, pp. xi - xii.

Jurisdictional Statute, 28 U.S.C. § 1254(1):

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ."

Federal Rules of Civil Procedure, Rule 56(e)

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."
>
> > The full text of Fed.R.Civ.P. 56 appears Appendix Dm infra, pp. xviii - xx.

Federal Rules of Evidence, Rule 803(6) and (7)

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity, to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of

> a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness."

STATEMENT OF THE CASE

Petitioners herein, Sarah T. and Robert B. Van Cleve, acquired a three-quarters acre lot on Cumberland Island in Camden County, Georgia, and constructed an A-Frame cabin thereon, in 1972. On October 23, 1972, the Cumberland Island National Seashore Act, 16 U.S.C. § 459i et seq. (the "Act"), authorized the establishment of the Cumberland Island National Seashore. The Department of the Interior was authorized to condemn lands within certain boundaries on Cumberland Island for this purpose. The Act provides that an individual may privately maintain a dwelling on the Island within the established boundaries if one of two criteria is met: Either (1) the dwelling must have been constructed prior to February 1, 1970, and the landowner must have elected to reserve a life

estate in the condemned land, or (2) the landowner must, prior to January 1, 1973, have persuaded the National Park Foundation, an agency which acts on behalf of the Department of the Interior, to enter into a deal whereby the landowner would convey his property to the National Park Foundation but would reserve a life estate in the property. 16 U.S.C. §459i-3(a) and (c).

Among other lots, the lot owned by petitioners was selected by the Department of the Interior to be condemned. Petitioners wished to maintain their dwelling on the lot but they could not elect to reserve a life estate in the land because the dwelling was constructed after February 1, 1970. After an unsuccessful attempt to meet the first criterion set forth above, petitoners sought to meet the second criterion; they offered, prior to January 1, 1973, to convey their property to the National Park Foundation on the condition that they would be allowed to keep the property for twenty-five years or

life. The National Park Foundation had made and was making deals such as the one proposed by petitioners with other Cumberland Island landowners, but the landowners with whom the Foundation chose to deal were large landowners--for example, certain members of the famous Carnegie family who owned much property on the Island. The words "with whom the Foundation chose to deal" in the previous sentence are precisely applicable. The National Park Foundation did not merely passively entertain offers as it received them from landowners both large and small. Rather, the Park Foundation was actively picking and choosing the Cumberland Island landowners with whom it would make deals. The agreements entered into prior to the January 1, 1973 cutoff date between the National Park Foundation and the Carnegies included, inter alia, the right to construct new homes on the Island by 1980, and the right to retain a life estate in existing dwellings regardless of the date of construction and keep these homes for periods

of time in excess of seventy-five years. The Department of the Interior admitted that such deals were the only means by which petitioners could hope to retain the use of their small house for the remainder of their lives. Yet, the National Park Foundation rejected petitioner's offer of a conveyance reserving use of the property for twenty-five years or life. Petitioners' attorney (who represented petitioners in this case before legal expense funds were depleted), another small landowner on Cumberland Island, had the same experience with the National Park Foundation. No like offers were rejected by the Foundation when made by a member of the Carnegie family. An affidavit filed by Elizabeth Towers Miller relates the substance of a conversation between Sarah T. Van Cleve, Elizabeth Towers Miller, and Mr. Sam Weems, a retired National Park Service Administrator who was in charge of Cumberland Island at the time the Act was passed. In that conversation Mr. Weems stated that he had advised the Van Cleves that the

National Park Foundation was interested only in dealing with Cumberland Island's large landowners.

Mr. John L. Bryant, Jr., President of the National Park Foundation, has signed affidavits stating that the Foundation has no record of having received an offer from the Van Cleves. Unfortunately, Ms. Van Cleve handwrites her correspondence and retained no copies of the written offer she and her husband made to the Foundation prior to January 1, 1973.

Because petitioners have steadfastly maintained that the National Park Foundation has no legal right to take their property under the circumstances outlined above, the United States of America, on behalf of the Department of the Interior, instituted this action in eminent domain.

In answer to the government's complaint, petitioners raised five affirmative defenses, the important one for purposes of this petition being the affirmative defense raised in

Paragraph 2(e) of their answer: that petitioners' rights under the Fifth Amendment to the United States Constitution were violated by the National Park Foundation's refusal to accept their offer to donate their property to the Foundation in return for the reservation of a life estate.

The government moved the District Court to grant summary judgment as to, inter alia, the constitutional issue raised in Paragraph 2(e). The government submitted the affidavit of John L. Bryant, Jr., who, as noted, is President of the National Park Foundation, wherein the affiant stated that he "ha[d] caused" a search of the records and correspondence files to be made and the files contained no correspondence reflecting an offer from the Van Cleves to donate their Cumberland Island property to the Foundation. The District Court granted summary judgment as to the affirmative defenses raised in Paragraphs 2(a) through (d) of petitioners' answer. As to the defense raised in Para-

graph 2(e), however, the Court denied the government's motion, concluding that the National Park Foundation was subject to the strictures of the Fifth Amendment when exercising its discretion to accept or reject a donative offer; and that, therefore, the government must show either that petitioners made no offer prior to January 1, 1973, or that the Foundation acted rationally in refusing petitioners' offer. The Court held that the government had not made either showing.

Ten days after the District Court's ruling, petitioners' attorney filed the affidavit of Elizabeth Towers Miller, described supra. Shortly thereafter, the government moved the Court to reconsider its earlier ruling as to the Paragraph 2(e) defense. The government submitted a second affidavit of John L. Bryant, Jr., wherein the affiant stated that he "ha[d] caused" another search of the records and correspondence files of the Foundation to be made and the

files contained no memoranda reflecting any offer, written or oral, from the Van Cleves to donate their property. The District Court reversed its earlier ruling as to Paragraph 2(e) and granted summary judgment thereon. The Court concluded that:

> "the government has now shown that the Van Cleves made no oral or written donation offer to the National Park Foundation prior to January 1, 1973. ...
>
> "The condemnees have failed to set forth any facts showing that there is a genuine issue for trial on this crucial point." Appendix B, infra, p. x.

Jury trial was then held on the issue of compensation. After the trial, final judgment of condemnation was rendered as to petitioners' property.

Petitioners appealed from the judgment of the District Court as to the ruling on Paragraph 2(e) of their answer. Petitioners also raised in the Court of Appeals the issue whether, under the due process and equal protection concepts expressed or inherent in the Fifth Amendment to the United States

Constitution, the National Park Foundation was required to affirmatively contact small as well as large landowners regarding the availability of a conveyance/reservation of life estate deal before condemning the small landowner's property.

As to the Paragraph 2(e) issue, the Court of Appeals concluded that the government's motion for summary judgment was properly supported and that the affidavit of Elizabeth Towers Miller was not evidence of an offer of the Van Cleves' property to the National Park Foundation and raised no genuine issue of fact. As to the affirmative contact issue, the Court of Appeals held that, in general, it did not consider issues not raised in the district court, but that in any event petitioners had not shown any injury from the Foundation's failure to contact them. The Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I. As to the Paragraph 2(e) issue, the

Court of Appeals' decision (A) is in conflict with decisions of both this Court and other federal appeals courts, and (B) has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In evaluating the propriety of the District Court's grant of summary judgment as to Paragraph 2(e) of petitioners' answer, the Court of Appeals concluded that the two affidavits of Mr. John L. Bryant, Jr., contained evidence which

> "would have been admissible at trial, Fed.R.Evid. 803(7), and is 'frequently the only way in which a negative fact may be proved.' McClanahan v. United States, 292 F.2d 630, 637 (5th Cir.), cert. denied, 368 U.S. 913, 82 S.Ct. 193, 7 L.Ed.2d 130 (1961) (citations omitted)." Appendix A, infra, p. ii.

Hence the Court of Appeals' conclusion that the government's motion for summary judgment was properly supported rests upon (1) the premise that the evidence contained in the Bryant affidavits would have been that at trial under the business records-absence

of entry exception to the hearsay rule, and upon (2) citation of and quotation from McClanahan v. United States, 292 F.2d 630 (5th Cir.), cert. denied, 368 U.S. 913, 82 S.Ct. 193, 7 L.Ed.2d 130 (1961). Neither of these two bases, however, standing either alone or together, provides sufficient support for the Court of Appeals' conclusion.

The applicable rule of law is contained in Rule 56 of the Federal Rules of Civil Procedure dealing with summary judgment. Subsection (e) of that Rule provides in part as follows:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. ... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . ." (Emphasis added).

As the emphasized language shows, Rule 56(e)

provides that affidavits, to properly support a motion for summary judgment, must be made on the personal knowledge of the affiant. The use of the conjunctive "and" shows that a supporting affidavit must meet this requirement as well as the other two requirements set forth in Rule 56(e), viz., the facts set forth in the affidavit must be admissible in evidence, and the affidavit must affirmatively establish the affiant's competency to testify to the matters stated therein. As the other language emphasized above shows, it is only "when a motion for summary judgment is made and supported" as required by the Rule that an adverse party must respond with opposing affidavits meeting the same requirements.

The decisions requiring that an affidavit filed in support of a motion for summary judgment be based on the affiant's personal knowledge are legion and come from both this Court and nearly all of the eleven circuits, including the Fifth Circuit. See,

e.g., Automatic Radio Mfg. Co., Inc. v. Hazeltine Research, Inc., 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950) (affiant's "information and belief" insufficient); Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944) (affiants' opinions insufficient); United States v. Bosurgi, 530 F.2d 1105 (2d Cir. 1976); Ward v. United States, 471 F.2d 667 (3d Cir. 1973); Antonio v. Barnes, 464 F.2d 584 (4th Cir. 1972); Local Union No. 490, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO v. Kirkhill Rubber Company, 367 F.2d 956 (9th Cir. 1966); Doza v. American National Insurance Company, 314 F.2d 230 (8th Cir. 1963); F.S. Bowen Electric Co. v. J.D. Hedin Construction Co., 316 F.2d 362 (D.C. Cir. 1963); Chan Wing Cheung v. Hamilton, 298 F.2d 459 (1st Cir. 1962); Roucher v. Traders & General Insurance Company, 235 F.2d 423 (5th Cir. 1956); G.D. Searle & Co. v. Chas. Pfizer & Co., 231 F.2d 316 (7th Cir. 1956) (affiant's opinion

insufficient); Stinnie v. Fidler, 75 F.R.D. 462 (E.D. Va. 1977); Dean Construction Company v. Simonetta Concrete Construction Corp., 37 F.R.D. 242 (S.D.N.Y. 1965).

The two affidavits of John L. Bryant which the government filed in support of its motion for summary judgment and motion for reconsideration as to Paragraph 2(e) of petitioners' answer were not based on the affiant's personal knowledge. The third paragraph of each of the affidavits states that "[a]ffiant has caused" a search of the records and correspondence files of the National Park Foundation to be made. The affidavits show that someone other than the affiant searched the Foundation's records and correspondence files. Since the affiant did not personally search the files, he has no personal knowledge that they do not contain memoranda of oral and written offers by the Van Cleves to donate their Cumberland Island property to the Foundation.

As President of the National Park

Foundation, Mr. Bryant was in a position similar to that occupied by the Regional Director of Agencies in Doza v. American National Insurance Company, supra. In that case, the plaintiffs claimed to be the beneficiaries of an insurance policy in which their deceased daughter was the named insured. They brought suit against the insurance company for refusal to pay. The insurer moved for summary judgment and attached to its motion the sworn answers to the plaintiffs' interrogatories written by its Regional Director of Agencies. The director asserted that no policy was ever issued by the insurer pending receipt of a physical examination which the daughter was to take, that a physical examination was a prerequisite to issuance, and that plaintiffs had been so informed by the insurer's agent. The District Court entered summary judgment for the insurer. The Eighth Circuit reversed. The Court of Appeals noted that the answers to the plaintiffs' interrogatories were made by

the insurer's Regional Director of Agencies "'according to his best knowledge and belief.'" 314 F.2d at 232. Consequently, the answers were "insufficient to sustain the burden of proof cast upon appellee." Id. The court continued:

> "When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence, and must not only be made on the personal knowledge of the affiant, but must show that the affiant possesses the knowledge asserted.'" Id. (quoting Sprague v. Vogt, 150 F.2d 795, 800 (8th Cir. 1945)).

In Stinnie v. Fidler, supra, Virginia prisoners brought a class action under 42 U.S.C. § 1983 alleging unconstitutional conditions of confinement. Among the defendants were several state level officials. The action was not progressed in the district court and during its pendency--some six and one-half years--Virginia prison authorities adopted new regulations designed to remedy the unconstitutional conditions. Consequently, the District Court dismissed the action without prejudice as moot. In doing so,

however, the court considered affidavits which had been filed by the defendants in support of their motions for summary judgment:

> "The affidavits submitted by the defendants in response to the plaintiffs' allegations and in support of their motions for summary judgment. . . do not establish that the statements made are based on personal knowledge as required by Rule 56(e), but rather, are in the nature of a summary of the general routines prescribed by each particular facility. The absence of affirmative showings of personal knowledge of specific facts from any of the parties makes summary judgment inappropriate relief." 75 F.R.D. at 464.

Dean Construction Company v. Simonetta Concrete Construction Corp., supra, was an interpleader action brought by Dean Construction Company (Dean) to determine which of the creditors of Simonetta Concrete Construction Corp. (Simonetta) were entitled to monies which Dean owed Simonetta. The United States and two other creditors filed claims to the fund. The government filed a motion for summary judgment on its claim for unpaid taxes. Considering the affidavits submitted

by the government, the District Court stated:

> "The affidavit submitted on behalf of the United States by Arthur M. Handler, Assistant United States Attorney ... was on 'information and belief based upon the records and files in the possession of the United States Attorney for the Southern District of New York.' This does not meet the personal knowledge requirement of Rule 56(e)." 37 F.R.D. at 245.

Each of the cases discussed involved an affidavit or sworn statement made by an official about a matter of which he did not have personal knowledge but about which he had been informed or advised. In each case, the matter at issue was analogous to the matter at issue in the present case. In the present case, the matter at issue is correspondence or memoranda with respect to a particular party and his property contained in the records and files of the National Park Foundation. In the Doza case, the matter at issue was an insurance policy with a particular party as named insured and particular persons as the named beneficiaries, and memoranda concerning a required physical

examination. In Stinnie, the matter at issue was the practices and procedures and conditions of confinement at the Virginia prisons; the objectionable information was a summary of the general routines prescribed at the prison units. In the Dean Construction Company case, the matter at issue was unpaid taxes as recorded in the files of the United States Attorney. In each of the cases, the courts ruled that the official's information about the matter at issue was not sufficient to support a motion for summary judgment under Rule 56(e).

Furthermore, in each of the cases discussed, lack of personal knowledge was held to be a critical defect in the official's affidavit. In none of the cases did the court make any attempt to rely on the business records exception to the hearsay rule, Rule 803(6), Federal Rules of Evidence--or the absence of entry exception, Rule 803(7), Federal Rules of Evidence--to find the affidavit proper under Fed.R.Civ.P. 56(e). This

is true, even though the matter at issue in each of the cases--especially Doza and the Dean Construction Company case--would lend itself to such an attempt. The affiant's lack of personal knowledge was held fatal and no attempt was made to rely on a business records rationale because the courts recognized, as the Court of Appeals below should have recognized, that an affidavit filed in support of a motion for summary judgment must meet each of the three distinct requirements established by Rule 56(e)--(1) personal knowledge, (2) admissibility of evidence, and (3) competency. Even if the information contained in an affidavit would be admissible at trial, the affidavit must still be made on personal knowledge of the affiant. If there is any question about the accuracy of this proposition, this Court's decision in Sartor v. Arkanzas Natural Gas Corporation, supra, lays the matter to rest. There, the Court, while not expressly invoking the personal knowledge requirement of Rule 56(e), assumed

that the opinion evidence contained in the affidavits was admissible, yet held that the affidavits were insufficient to support the defendant's motion for summary judgment. 321 U.S. at 624 and 628, 64 S.Ct. at 727 and 729. This conclusion is sensible: a lack of personal knowledge ought to prevent summary judgment because summary judgment deprives a litigant of trial on the merits. Since the affidavits filed by the government in the present case did not meet the personal knowledge requirement of Rule 56(e), they could not be used to support the government's motion for summary judgment.

Nor is the decision below aided by the Court of Appeals' citation of and quotation from McClanahan v. United States, 292 F.2d 630 (5th Cir.), cert. denied, 368 U.S. 913, 82 S.Ct. 193, 7 L.Ed.2d 130 (1961). Indeed, McClanahan aids petitioners' present argument: In that case the issue was the sufficiency of courtroom testimony to support a verdict, not the sufficiency of an affidavit

to support a motion for summary judgment. Even so, the witness in McClanahan had personal knowledge of the matter about which he testified.

> "The final point raised by appellant is that a witness for the prosecution was permitted to testify that he had examined records in Chicago which were not introduced into evidence or available at the trial, and that he had found no other transactions than the ones that had been admitted on stipulation. We think this point is without substance since a witness may clearly testify as to his failure to find the records after a search." 292 F.2d at 636-37 (emphasis added).

It was, therefore, a personal knowledge situation in which the Fifth Circuit made the statement that absence of a record "is frequently the only way in which a negative fact can be proved." Id at 637.

Since the government's motion for summary judgment was not properly supported, petitioners had no duty to come forward, pursuant to Rule 56(e) with affidavits in opposition to the government's motion for summary judgment. Hence the nature of the

affidavit filed by petitioners after the District Court's initial ruling is legally irrelevant.

By finding affidavits not based on personal knowledge to be in compliance with Rule 56(e), the Court of Appeals has run afoul of the settled law not only of the circuit courts but of this Honorable Court as well. The Court of Appeals seems to have ignored the accepted and usual course of judicial proceedings on motions for summary judgment as plainly set forth in Rule 56(e), and an exercise of this Court's power of supervision is warranted, particularly since the issue at hand is one that can have a "life or death" impact on a litigant's claim.

If the Court of Appeals' legally erroneous decision is not reversed and petitioners given an opportunity for trial, a gross miscarriage of justice will result. Petitioners have lived in the small frame house on Cumberland Island for many years and they were planning to live there for the rest of their

lives. It is the house in which they raised their children, the house in which they have planned to live out the days of their lives. The value of the house to the Van Cleves as a family cannot be measured in dollars and cents or reduced to a sophisticated "fair market value" equation. Petitioners have made an honest effort to comply with the government's regulations concerning the Cumberland Island area but have been thwarted by a lack of information and apparent discrimination. See Statement of the Case," supra, and § II, infra. It would be utterly inconsistent with the Constitution's guarantee against deprivation of life, liberty, and property for this Honorable Court to permit the Court of Appeals' decision to stand uncorrected.

II. The Court of Appeals erred in concluding that petitioners had not shown any injury under the Fifth Amendment to th United States Constitution from the National Park Foundation's failure to contact them

regarding the availability of a conveyance/ reservation of life estate deal before condemning their property.

The due process and equal protection concepts expressed or inherent in the Fifth Amendment to the United States Constitution require that governmental action be reasonably related to a legitimate governmental objective and neither arbitrary nor discriminatory. Harris v. McRae, -- U.S. --, 100 S.Ct. 2671, 65 L.Ed. 784 (1980); Mathews v. de Castro, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976); Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971). The District Court below correctly ruled that the National Park Foundation's discretionary action in accepting or rejecting donative offers was subject to the strictures of the Fifth Amendment. As petitioners "Statement of the Case," supra, shows, the National Park Foundation acted in an arbitrary and discriminatory manner when (1) it refused to accept the offer of peti-

tioners, a small Cumberland Island landowner, to convey their property to the Foundation on the condition that they would be allowed to keep the property for twenty-five years or life; (2) at the same time that it was rejecting petitioners' offer and the offers of other small landowners, the Foundation was making conveyance/reservation of life estate deals with large landowners--the Foundation was actively picking and choosing the Cumberland Island landowners with whom it would deal; and (3) the deals it made with large landowners gave them special privileges, e.g., the right to construct new dwellings on the Island by 1980, even though, for small landowners, dwellings built after February 1, 1970 deprived the owner of his right to elect reservation of a life estate.

Petitioners asserted in their brief to the Court of Appeals that due process and equal protection require that the National Park Foundation affirmatively contact small as well as large landowners regarding the

availability of a conveyance/reservation of life estate deal before condemning the small landowners' property. In considering this claim, and in concluding that petitioners had not shown any injury from the National Park Foundation's failure to contact them, the Court of Appeals noted the general rule that a federal appeals court does not consider issues not raised in the trial court. However, as this Court pointed out in Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), the general rule against appellate review is subject to certain exceptions, one of which is a situation where "injustice might otherwise result.'" 428 U.S. at 121, 96 S.Ct. at 2877 (quoting Hormel v. Helvering, 312 U.S. 552. 557, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941). If the Court of Appeals had analyzed petitioners' Fifth Amendment claim more carefully, it would have understood how petitioners were injured--and how injustice resulted--from the National Park Foundation's failure to contact them

before condemning their property.

The Court of Appeals apparently assumed that all a small landowner need have done in order to enter into negotiations with the National Park Foundation was to make an offer to donate his property. If this assumption were true, then not being contacted would cause no injury to a small landowner who knew to make an offer: once he made the offer, he would be treated the same way a large landowner was treated. The Court of Appeals' assumption, however, is fallacious. Petitioners' complaint in this case is not that they did not know to make an offer but that they did not know how to make an offer that would be taken seriously by the National Park Foundation. Petitioners were injured in that they were not given precise instructions as to how to make an offer which would be in a form and manner acceptable to--and guaranteed to be preserved by--the Foundation. Petitioners were discriminated against in that as small landowners they were not given such

instructions while large landowners were given such instructions and were enabled thereby to convey their property to the Foundation while retaining an estate for life or even seventy-five years or more. Petitioners' awareness "of their rights under the statute," decision of Court of Appeals, Appendix A, p. iii, has no meaning if petitioners are effectively prevented by the responsible agency from exercising those rights.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

Sarah T. Van Cleve
Sarah T. Van Cleve
3750 Riverside Avenue
Jacksonville, Florida
32205
Representing Herself

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Petition for Writ of Certiorari and an Appendix thereto have been mailed First Class to Martin Matzen, Esquire, Room 2343 Department of Justice, 9th and Constitution Street, N.W., Washington, D.C., 20530, and Solicitor General, Department of Justice, Washington, D. C., 20530, this 22nd day of May, 1981.

Sarah T. Van Cleve

Sarah T. Van Cleve

APPENDIX TO PETITION
FOR
WRIT OF CERTIORARI

UNITED STATES of America, Plaintiff-Appellee,

v.

34.60 ACRES OF LAND, MORE OR LESS, IN the COUNTY OF CAMDEN, State of Georgia, Elinor T. Giobbi et al., etc., Defendants,

Sarah T. Van Cleve and Robert B. Van Cleve, Defendants-Appellants.

No. 79-1312
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit B

April 15, 1981.

In a condemnation suit brought by the federal Government, the United States District Court for the Southern District of Georgia, at Brunswick, Anthony A. Alaimo, J., granted summary judgment to the Government. Landowners appealed. The Court of Appeals held that where landowners contended that they had offered to donate their property under statute reserving life estate, but were improperly refused, evidence in affidavits submitted by the Government, that National Park Foundation had no record whatsoever of any offer, written or oral, from landowners would have been admissible at trial and, absent any countervailing affidavit or other evidence to show that offer had been made prior to statutory cutoff date, it was sufficient to permit district court to find that there was no genuine issue of fact and to grant summary judgment for the United States.

Affirmed.

1. Evidence ⇐351

In condemnation suit, wherein landowners contended that they had offered to donate their property under statute, reserving life estate, but were improperly refused, evidence of negative fact that National Park Foundation had no record whatsoever of any offer, written or oral, from landowners would have been admissible at trial. Cumberland Island National Seashore Act, § 1 et seq., 16 U.S.C.A. § 459i et seq.; Fed.Rules Evid. Rule 803(7), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2481

In condemnation suit, wherein landowners contended that they had offered to donate their property under statute, reserving life estate, but were improperly refused, evidence in affidavits submitted by Government, demonstrating that National Park Foundation had no record whatsoever of any offer, written or oral, from landowners, was sufficient, absent any countervailing affidavit or other evidence to show that offer had been made prior to statutory cutoff date, to permit district court to find that there was no genuine issue of fact and to grant summary judgment for the United States. Cumberland Island National Seashore Act, § 1 et seq., 16 U.S.C.A. § 459i et seq.; U.S.C.A.Const. Amends. 5, 14; Fed.Rules Evid. Rule 803(7), 28 U.S.C.A.

3. Federal Courts ⇐611

Generally, Court of Appeals does not consider issues not raised in district court.

4. Eminent Domain ⇐171

Landowners, defendants in condemnation proceeding, by claiming that they had made offer to donate the land demonstrated their awareness of their rights

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EXHIBIT "A"

under statute authorizing donation with reservation of life estate, and having shown awareness of rights could claim no injuries from any failure of government to publicize such rights. Cumberland Island National Seashore Act, § 1 et seq., 16 U.S.C.A. § 459i et seq.; U.S.C.A.Const. Amends. 5, 14.

Appeal from the United States District Court for the Southern District of Georgia.

Before RONEY, TJOFLAT and VANCE, Circuit Judges.

PER CURIAM:

This appeal arises from a condemnation suit brought by the United States against several acres of land on Cumberland Island for the establishment of the Cumberland Island National Seashore under 16 U.S.C.A. §§ 459i *et seq.* Under that statute, Congress provided that landowners meeting certain conditions could by agreement donate their property to the National Park Foundation and retain a life estate. The landowner appellants here contest the right of the Government to condemn their property because, they contend, they offered to donate their property under the statute, but were improperly refused. As an alternative proposition presented on appeal but not to the trial court, appellants contend the Government could not, consistent with due process and equal protection, condemn the property without first contacting them about the availability of the donative alternative to condemnation. Finding no issue of fact, the district court granted summary judgment against appellants' claim they made a timely offer to donate their property to the National Park Foundation. We affirm.

[1] The United States asserted that the landowners had not made any offer to the National Park Foundation prior to January 1, 1973 the cut-off date in the statute. Affidavits were submitted demonstrating the Foundation had no record whatsoever of any offer, written or oral, from the appellants. This evidence would have been admissible at trial, Fed. R.Evid. 803(7), and is "frequently the only way in which a negative fact may be proved." *McClanahan v. United States*, 292 F.2d 630, 637 (5th Cir.), *cert. denied*, 368 U.S. 913, 82 S.Ct. 193, 7 L.Ed.2d 130 (1961) (citations omitted).

In response, the appellants relied upon repetition of the unverified allegation contained in their answer, neither submitting their own affidavit nor suggesting other evidence that would show either one of them had made an offer to the Foundation prior to January 1, 1973. The law is clear that a party cannot rest on the allegations contained in his pleading in opposition to a properly supported summary judgment motion made against him. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592 1593, 20 L.Ed.2d 569 (1968). Appellants did submit an affidavit of a relative indicating that a retired Park Service employee had made the following statement:

> About the summer of 1972, the Van Cleves said they wanted to make a deal with the National Park Foundation to stay on Cumberland, but I advised them that the Foundation had been dealing only with owners of large tracts and that they did not have a chance as the house was built after the cut-off date specified in the bill.

Appellants submitted the affidavit "merely as evidence as to [their] intent

early on to deal with the National Park Foundation—not as evidence of *the* offer." Brief for Appellant at 11 (emphasis in the original). Viewed in the light most favorable to appellants with all reasonable doubt resolved in their favor, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135 (5th Cir. 1973), such an affidavit is not evidence of an offer of the appellants' property to the Foundation. On this record, the district court properly determined there was no genuine issue of fact and granted summary judgment for the United States.

[2–4] Appellants argue an issue not raised or argued to the district court: that the National Park Foundation had a duty, dictated by due process and equal protection considerations, to approach small landowners as well as large landowners and inform them that a life estate might be retained through a donative agreement with the Foundation. Generally, we do not consider issues not raised in the district court. *Noritake Co., Inc. v. M/V HELLENIC CHAMPION*, 627 F.2d 724, 732 (5th Cir. 1980). In any event, however, the landowners have failed to demonstrate any injury from the alleged breach of duty. The landowners claim they made an offer to donate. Such an assertion shows they were aware of their rights under the statute. They can claim no injury from any failure of the Government to publicize such rights. *Cf. Ray Baillie Trash Hauling, Inc. v. Kloppe*, 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 415 U.S. 914, 94 S.Ct. 1410, 39 L.Ed.2d 468 (1974) (a party must show that he has suffered some direct and personal injury resulting from the violation of a right designed to protect that party).

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA,	*	CIVIL ACTION
	*	NO. 277-20
VS.	*	
34.60 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF CAMDEN, STATE OF GEORGIA, ELINOR T. GIOBBI, et al., AND UNKNOWN DEFENDANTS	*	

U. S. DISTRICT COURT
Southern District of Ga.
Filed in office
4:00 p.m.
NOV 1 1979
Deputy Clerk

ORDER

In the above-styled condemnation action, the Government moves to strike all defenses in paragraphs 2(a), 2(b), 2(c), and 2(d) of the answers filed by defendants, Van Cleves, Potterfield and Read, as well as the defenses in paragraph 2(e) of the Van Cleves' answer. Alternatively, the Government moves for summary judgment on these defenses. The defendants' land is being taken pursuant to 16 U.S.C. §§ 459i through 459i-9, creating the Cumberland Island National Seashore.

In paragraph 2(a) of each answer, the landowners state that the Government cannot take their land without first having complied with "conditions precedent established by the Environmental Protection Agency." The landowners cite no such "conditions precedent," and the Court is satisfied that none exists. Construing this defense as an allegation of the Government's non-compliance with the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., the motion to strike will be granted. Since this defense does not question whether the land is being taken for a congressionally authorized public use, it is not a sufficient defense to the taking. See United States v. 416.81 Acres of Land, 514 F.2d 627, 631 (7th Cir. 1975); United States v. 255.25 Acres of Land, 553 F.2d 571, 572 n.2 (8th Cir. 1977). See also United States v. 178.15 Acres of Land, 543 F.2d 1391 (4th Cir. 1976).

Paragraph 2(b) of each answer challenges the authority of the Government to condemn land on Cumberland Island. The

EXHIBIT "B"

motion for summary judgment will be granted as to this defense. It is clear that the takings are congressionally authorized. See 16 U.S.C. § 459i-1 and 40 U.S.C. § 257.

In paragraph 2(c) of the answers filed by the Potterfields and Reads, and paragraph 2(d) of the answer filed by the Van Cleves, the landowners allege that the Government has not condemned all privately owned property on Cumberland Island, but has arbitrarily and capriciously selected their land for condemnation, in violation of their rights under the Fifth Amendment. The Court construes these defenses as alleging a denial of equal protection, and based upon the record, summary judgment will be granted for the Government on these defenses. The Government has shown to the exclusion of all genuine issues of fact that it did not act arbitrarily in deciding to condemn the defendants' land, and that in this regard, the defendants have not without reason been treated differently from others similarly situated. The case at bar and the numerous other condemnation actions which are now pending in this Court involving the Cumberland Island National Seashore, attest to the fact that the Government has condemned many tracts of land on Cumberland Island.

The Court construes paragraph 2(c) of the Van Cleves' answer as a claim that under 16 U.S.C. § 459i-3, they are entitled to retain a right of use and occupancy in their house.[1]

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[1] 16 U.S.C. § 459i-3 provides in relevant part: "(a) With the exception of any property deemed necessary by the Secretary for visitor facilities or administration of the seashore, any owner or owners of improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for themselves and their successors or assigns a right of use and occupancy of the property for noncommercial residential purposes, for twenty-five years, or, in lieu thereof, for a term ending at the death of the owner or his spouse, whichever is later. . . ." * * * "(c) The term "improved property", as used in this section shall mean a detached, noncommercial residential dwelling, the construction of which was begun before February 1, 1970 (hereinafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated."

The Van Cleves allege in paragraph 2(c) that they erected their residence on the tract in question "prior to the enactment of Public Law 92-536" creating the Cumberland Island National Seashore (October 23, 1972). However, the relevant date in this respect is February 1, 1970. 16 U.S.C. § 459i-3(c). The defendants conceded at the pre-trial hearing of August 8, 1978, that construction was not begun on their dwelling before February 1, 1970. Accordingly, the Government's motion for summary judgment is granted as to this defense.

In paragraph 2(e) of their answer, the Van Cleves allege that pursuant to the last clause of 16 U.S.C. § 459i-3(a), and prior to January 1, 1973, they offered to donate their land to the National Park Foundation, conditioned on their retention of a life estate in the land.[2] The Foundation is said to have rejected this offer, while accepting identical offers from similarly situated landowners on Cumberland Island. The Van Cleves allege, in effect, that the National Park Foundation should have accepted their offer, and it is clear that if it had done so, the Government could not take their retained life estate, 16 U.S.C. § 459i-3(a). Thus, the Court cannot conclude that this defense is insufficient.

Of course, the National Park Foundation is not required to accept all donation offers, 16 U.S.C. § 19g. Here, the Foundation's decision to accept or reject an offer could determine whether a landowner will be able to retain any interest in his land, and in this situation, the Foundation could not arbitrarily and purposefully discriminate against one landowner

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[2] The last clause of 16 U.S.C. § 459i-3(a) states: "Provided further, That when acquiring lands, waters, and interests therein from the National Park Foundation, its successors and assigns, the Secretary shall acquire such lands, waters, and interests subject to the written terms and conditions contained in those transactions, including but not limited to options, entered into by the National Park Foundation prior to January 1, 1973, and that such previous written rights and interests shall prevail over provisions of this subsection."

by rejecting his offer, while accepting identical offers from other landowners. Compare Snowden v. Hughes, 321 U.S. 1 (1944).

The Government argues that the Foundation is a charitable and non-profit corporation, 16 U.S.C. § 19e, and cannot properly be characterized as an agency or arm of the Department of the Interior. The Court agrees, but concludes that the strictures of the Fifth Amendment are applicable. The National Park Foundation was created by an Act of Congress for the sole purpose of encouraging gifts of real and personal property to the National Park Service, 16 U.S.C. § 19e. The Foundation may utilize the services and facilities of the Department of Interior and Department of Justice without reimbursement, 16 U.S.C. § 19h, and contributions, gifts, or transfers to the Foundation are regarded as contributions, gifts, or transfers to the United States, 16 U.S.C. § 19l. The Foundation is required to report to Congress at the end of each fiscal year, 16 U.S.C. § 19n.

It is obvious that the National Park Foundation was designed to function in close concert with the National Park Service, and the two are closely entwined. Accordingly, the Court concludes that the Foundation is subject to the strictures of the Fifth Amendment when it exercises its discretion to accept or reject a donation offer. Compare Smith v. Young Men's Christian Association of Montgomery, Inc., 462 F.2d 634 (5th Cir. 1972); Duriso v. K-Mart No. 4195, Division of S.S. Kresge Co., 559 F.2d 1274 (5th Cir. 1977). In this context, the Constitution requires only that the Foundation act rationally and that it not act in an arbitrarily discriminatory manner. The Foundation is not required to accept all donation offers. To be entitled to summary judgment, the government must show either that the Van Cleves made no offer prior to January 1, 1973, or that the Foundation acted rationally in refusing the alleged offer.

The Court concludes that the Government has not met its burden on the motion for summary judgment. It has shown that the Foundation never received a written offer to donate from the Van Cleves, and that such offers are customarily made in writing. See Affidavit of John L. Bryant, Jr., President of the National Park Foundation. Defendants allege that they did offer to donate their land and dwelling to the Foundation, conditioned on their retention of the land for life, or for twenty-five years. The Foundation is said to have refused even to discuss the matter. Defendants do not allege that they made a written offer to the Foundation, and the Government has not shown that donation offers are required by law to be in writing. No such requirement appears in the legislation creating the National Park Foundation, 16 U.S.C. § 19e, et seq., or in 16 U.S.C. § 459i-3. The Government has not shown to the exclusion of all genuine issues of material fact that the Van Cleves did not offer to donate their land to the Foundation prior to January 1, 1973. Compare Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-161 (1970).

Nor has the Government shown why the alleged offer was rejected. On this record, the Government is not entitled to summary judgment on paragraph 2(e) of the Van Cleves' complaint.

Paragraph 2(d) of the answers filed by defendants, Potterfield and Read, alleges that as a "condition precedent" to the plaintiffs' right to take their land, it must engage with them in "good faith settlement negotiations." The defendants allege that the Government has failed to do this. The motion to strike will be granted as to these defenses. See 42 U.S.C. §§ 4651 and 4602(a).

In sum, as to the answers filed by defendants, Potterfield and Read, the Government's motion to strike is granted as to

paragraphs 2(a) and 2(d), and its motion for summary judgment is granted as to paragraphs 2(b) and 2(c). Turning to the answer filed by the Van Cleves, the motion to strike is granted as to paragraph 2(a), and the motion for summary judgment is granted as to paragraphs 2(b), 2(c), and 2(d). The Government's motions are denied as to paragraph 2(e) of the Van Cleves' answer.

So Ordered, this 17th day of November, 1978.

Chief Judge, United States District Court, Southern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA	*	CIVIL ACTION
Plaintiffs	*	NO. 277-20
VS	*	
34 60 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF CAMDEN, STATE OF GEORGIA, ELINOR T. GIOBBI, ET AL., AND UNKNOWN DEFENDANTS,	*	
Defendants	*	

U. S. DISTRICT COURT
Southern District of Ga.
Filed in office
NOV 29 1978
H. R. Crumley
Deputy Clerk

ORDER

The above-styled action is presently before the Court on the government's motion for reconsideration of that portion of the Court's Order of November 10, 1978, which denied the government's motion to strike and alternative motion for summary judgment as to paragraph 2(e) of the answer filed by the Van Cleves.

The government has now shown that the Van Cleves made no oral or written donation offer to the National Park Foundation prior to January 1, 1973. See 16 U.S.C. § 459i-3; Affidavit of John L. Bryant, Jr., President of the National Park Foundation.

The condemnees have failed to set forth any facts showing that there is a genuine issue for trial on this crucial point. See Rule 56(e), Fed. R. Civ. P. In fact, the affidavit filed by the Van Cleves supports the government's proof to the effect that these landowners never approached the National Park Foundation with an offer to donate. Accordingly, the government's motion for reconsideration is hereby granted. Summary judgment is granted for the government on paragraph 2(e) of the Van Cleves' answer.

So Ordered, this 29th day of November, 1978.

Chief Judge, United States District Court, Southern District of Georgia

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APPENDIX C

CUMBERLAND ISLAND NATIONAL SEASHORE ACT

16 U.S.C. §§ 459i et seq.

§ 459i. Cumberland Island National Seashore; purposes; establishment; boundary revisions; notification of Congressional committees, publication in Federal Register

In order to provide for public outdoor recreation use and enjoyment of certain significant shoreline lands and waters of the United States, and to preserve related scenic, scientific, and historical values, there is established in the State of Georgia the Cumberland Island National Seashore (hereinafter referred to as the "seashore") consisting of the area generally depicted on the drawing entitled "Boundary Map, Cumberland Island National Seashore", numbered CUIS-40,000D, and dated January 1978, which shall be on file and available for public inspection in the offices of the National Park Service, Department of the Interior. The Secretary of the Interior (hereinafter referred to as the "Secretary") may after notifying the Committees on Interior and Insular Affairs of the United States House of Representatives and United States Senate in writing, make minor adjustments in the boundary of the seashore from time to time by publication of a revised drawing or other boundary description in the Federal Register, but the total acreage within the boundaries shall not exceed forty thousand five hundred acres.

§ 459i-1. Same; acquisition of lands; authority of Secretary; mainland lands for access to seashore administrative and visitor facilities; State lands; transfer from Federal agency to administrative jurisdiction of Secretary

Within the boundaries of the seashore,

the Secretary may acquire lands, waters, and interests therein by purchase donation, transfer from any Federal agency or exchange. The Secretary may also acquire not to exceed one hundred acres of lands or interests in lands on the mainland to provide access to the administrative and visitor facilities for the seashore. Any lands or interests therein owned by the State of Georgia, or any political subdivision thereof may be acquired only by donation. Notwithstanding any other provision of law, any Federal property located within the boundaries of the seashore may, with the concurrence of the agency having custody thereof, be transferred without transfer of funds to the administrative jurisdiction of the Secretary for the purposes of the seashore.

§459i-2. Same; Cumberland Island Parkway; right-of-way; administration; regulations

For the purpose of providing access from Interstate 95 to the mainland administrative visitor facilities of the seashore, the Secretary may designate as the Cumberland Island Parkway a right-of-way, together with adjacent or related sites for public noncommercial recreational use and for interpretation of scenic and historic values, of not more than one thousand acres of lands, waters, and interests therein. The Secretary is authorized to acquire only by donation those lands and interests therein, and other property comprising such right-of-way and adjacent or related sites as he may designate pursuant to sections 459i to 459i-9 of this title for the development, hereby authorized, of a road of parkway standards, including necessary bridges, spurs, connecting roads, access roads, and other facilities, and for the development and interpretation of recreation areas and historic sites in connection therewith. Lands acquired for the parkway shall be administered as a part of the seashore, subject to all laws and regulations applic-

able thereto, and subject to such special regulations as the Secretary may promulgate for the parkway.

§459i-3. Same; acquisition of property--Private right of use and occupancy for residential purposes for fixed term of years or for life; election by owner; exception of property for visitor facilities or administration of seashore; compensation; contemporaneous restriction on development of public use facilities; lands, waters, and interests from National Park Foundation

(a) With the exception of any property deemed necessary by the Secretary for visitor facilities or administration of the seashore, any owner or owners of improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for themselves and their successors or assigns a right of use and occupancy of the property for noncommercial residential purposes, for twenty-five years, or, in lieu thereof, for a term ending at the death of the owner or his spouse, whichever is later. The owner shall elect the term to be reserved. The Secretary shall pay to the owner the fair market value of the property on the date of such acquisition less the fair market value on such date of the right retained by the owner: Provided, however, That, in addition, for so long as a right of use and occupancy remains in effect by the donors of land of one hundred acres or more, the Secretary shall not, with respect to such lands, develop any public use facilities except for trails, road access, and utilities: Provided further, That when acquiring lands, waters, and interests therein from the National Park Foundation, its successors and assigns, the Secretary shall acquire such lands, waters, and interests subject to the written terms and conditions in those transactions, including but not limited to options, entered into by the National Park Foundation prior to January 1, 1983, and that

such previous written rights and interests shall prevail over provisions of this subsection.

Commercial use prohibition; termination of use and occupancy upon tender of compensation

(b) A right of use and occupancy retained or enjoyed pursuant to this section may be terminated with respect to the entire property by the Secretary upon his determination that the property or any portion thereof has ceased to be used for noncommercial residential purposes and upon tender to the holder of a right an amount equal to the fair market value, as of the date of tender, of that portion of the right which remains unexpired on the date of termination.

"Improved property" defined

(c) The term "impred property", as used in this section shall mean a detached, noncommercial residential dwelling, the construction of which was begun before February 1, 1970 (hereinafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated.

Little Cumberland Island; acquisition restrictions

(d)(1) In order to provide an opportunity for the establishment of a natural and scenic preserve by voluntary private action of certain owners of lands within the seashore, and notwithstanding anything to the contrary herein contained, no lands or in-

terests in lands shall be acquired on Little Cumberland Island without the consent of the owner, for a period of one year from October 23, 1972, except as specifically otherwise provided herein.

(2) In the event that the owners of land on Little Cumberland Island enter into an irrevocable trust or some other irrevocable agreement for the preservation of the resources of Little Cumberland Island which, in the judgment of the Secretary, assures the protection of the resources in a manner consistent with the purposes for which the seashore is established, the authority of the Secretary to acquire such lands shall be suspended for such time as the trust is in effect and the lands are used and occupied in accordance therewith.

(3) If, at any time during the one-year period following October 23, 1972, the Secretary determines that any lands on Little Cumberland Island are threatened with development or continuation of the trust herein referred to, then the Secretary may acquire such lands, or interests therein, by any of the methods provided for in section 459i-1 of this title.

§459i-4. Same; hunting and fishing

The Secretary shall permit hunting, fishing, and trapping on lands and waters under his jurisdiction within the boundaries of the seashore in accordance with the appropriate laws of Georgia and the United States to the extent applicable, except that he may designate zones where, and establish periods when, no hunting, fishing, or trapping shall be permitted for reasons of public safety, administration, fish and wildlife management, or public use and enjoyment. Except in emergencies, any regulations prescribing any such restrictions shall be put into effect only after consultation with the appropriate State

agency responsible for hunting, fishing, and trapping activities.

§459i-5. Same; administration, protection, and development--Applicability of provisions; utilization of statutory authorities

(a) The seashore shall be administered, protected, and developed in accordance with the provisions of sections 1 and 2 to 4 of this title, as amended and supplemented, except that any other statutory authority available to the Secretary for the conservation and management of natural resources may be utilized to the extent he finds such authority will further the purposes of sections 459i to 459i-9 of this title.

Preservation in primitive state; recreational activities exception

(b) Except for certain portions of the seashore deemed to be especially adaptable for recreational uses, particularly swimming, boating, fishing, hiking, horseback riding, and other recreational activities of similar nature, which shall be developed for such uses as needed, the seashore shall be permanently preserved in its primitive state, and no development of the project or plan for the convenience of visitors shall be undertaken which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions not prevailing, nor shall any road or causeway connecting Cumberland Island to the mainland be constructed.

§459i-6. Same; State and local jurisdiction

Nothing in sections 459i to 459i-9 of this title shall deprive the State of Georgia or any political subdivision thereof of its civil or criminal jurisdiction over persons

found, acts performed, and offenses committed within the boundaries of the seashore, or of its right to tax persons, corporations, franchises, or other non-Federal property on lands included therein.

§459i-7. Same; water resource developments

The authority of the Secretary of the Army to undertake or contribute to water resource developments, including shore erosion control, beach, protection and navigation improvements on land and/or waters within the Cumberland Island National Seashore shall be exercised in accordance with plans which are mutually acceptable to the Secretary of the Interior and the Secretary of the Army and which are consistent with both the purpose of sections 459i to 459i-9 of this title and the purpose of existing statutes dealing with water and related land resource development.

§459i-8. Same; report to President

Within three years from October 23, 1972, the Secretary of the Interior shall report to the President, in accordance with sections 1132(c) and (d) of this title, his recommendations as to the suitability or non-suitability of any area within the national seashore for preservation as wilderness, and any designation of any such area as a wilderness shall be accomplished in accordance with sections 1132(c) and (d) of this title.

§459i-9. Same; authorization of appropriations

There are authorized to be appropriated not to exceed $28,500,000 for the acquisition of lands and interests in lands and not to exceed $27,840,000 for develpoment of the seashore.

APPENDIX D

RULE 56

FEDERAL RULES OF CIVIL PROCEDURE

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not

rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts es-

sential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

GOVERNMENT EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

BRUNSWICK DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. 34.60 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF CAMDEN, STATE OF GEORGIA, ELINOR T. GIOSBI, ET AL., AND UNKNOWN DEFENDANTS, Defendants.	CIVIL ACTION NO. CV277-20 TRACT NO.: 02-165, formerly 02-127 (Robert B. Van Cleve, et ux)

AFFIDAVIT

Affiant, John L. Bryant, Jr., being first duly sworn, deposes and states as follows:

1. Affiant is the President of The National Park Foundation, a non-profit, charitable, tax-exempt foundation chartered by the United States Congress in 1967 under Public Law 90-209 for the purpose of encouraging private gifts of real and personal property for the benefit of the National Park Service. Offers to donate real property are made in writing for consideration by The Foundation.

2. As President of The National Park Foundation, affiant has custody, care, control and access to all of the original records and correspondence files of the said Foundation;

3. Affiant has caused a diligent search of the records and correspondence files of The National Park Foundation to be made with reference to an alleged offer by the defendants, Robert B. Van Cleve (a/k/a Robert Baldwin Van Cleve) and Sarah T. Van Cleve, his wife, to give and donate property owned by them on Cumberland Island, Camden County, Georgia, to the said Foundation;

4. As a result of said search of the records and correspondence files of the said Foundation, affiant states that there is no correspondence of any kind or import in its files from the defendants, Robert B. Van Cleve and Sarah T. Van Cleve, to The National Park Foundation;

1050

EXHIBIT "E"

5. Further, affiant sayeth not.

John L. Bryant, Jr.

SEAL

Subscribed to and sworn before me
this 25th day of September, 1978
Notary Public Jeanne K. Lowe
My commission expires: May 14, 1982

GOVERNMENT EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

BRUNSWICK DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. 34.60 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF CAMDEN, STATE OF GEORGIA, ELINOR T. GIOBBI, ET AL., AND UNKNOWN DEFENDANTS, Defendants.	CIVIL ACTION NO. CV277-20 TRACT NO.: 02-165, formerly 02-127 (Robert B. Van Cleve, et ux)

SUPPLEMENTAL
AFFIDAVIT

Affiant, John L. Bryant, Jr., being first duly sworn, deposes and states as follows:

1. Affiant is the President of the National Park Foundation, a non-profit, charitable, tax-exempt foundation chartered by the United States Congress in 1967 under Public Law 90-209 for the purpose of encouraging private gifts of real and personal property for the benefit of the National Park Service.

2. As President of the National Park Foundation, affiant has custody, care, control and access to all of the original records and correspondence files of the said Foundation;

3. Affiant has caused another diligent search of the records and correspondence files of The National Park Foundation to be made with reference to an alleged offer by the defendants, Robert B. Van Cleve (a/k/a Robert Baldwin Van Cleve) and Sarah T. Van Cleve, his wife, to give and donate property owned by them on Cumberland Island, Camden County, Georgia, to the said Foundation;

4. As a result of said search of the records and correspondence files of the said Foundation, affiant states that there is no memoranda, notations or any other evidence in said files reflecting any offer, written or oral, from the defendants, Robert B. Van Cleve and Sarah T. Van Cleve, to the National Park Foundation;

5. This affidavit supplements affiant's previous affidavit given by him in this cause on this matter.

6. Further, affiant sayeth not.

John L. Bryant, Jr.

SEAL

Subscribed to and sworn before me
this 22nd day of November, 1975
Notary Public Eleanor K. Turner
My commission exoires: May 14, 1982

Office-Supreme Court, U.S.
FILED
MAY 27 1981
ALEXANDER L. STEVAS,
CLERK

80-2050

AMENDED
APPENDIX TO PETITION
FOR
WRIT OF CERTIORARI

UNITED STATES of America,
Plaintiff-Appellee,

v.

34.60 ACRES OF LAND, MORE OR LESS, IN the COUNTY OF CAMDEN, State of Georgia, Elinor T. Giobbi et al, etc., Defendants,

Sarah T. Van Cleve and Robert B. Van Cleve,
Defendants-Appellants.

No. 79-1342
Summary Calendar.

United States Court of Appeals,
Fifth Circuit
Unit B

April 15, 1981.

Appeal from the United States District Court for the Southern District of Georgia.

Before RONEY, TJOFLAT and VANCE, Circuit Judges.

PER CURIAM:

This appeal arises from a condemnation suit brought by the Unites States against several acres of land on Cumberland Island for the establishment of the Cumberland Island National Seashore under 16 U.S.C.A. §§ 459i et seq. Under that statute, Congress provided that landowners meeting certain conditions could by agreement donate their property

to the National Park Foundation and retain a life estate. The landowner appellants here contest the right of the Government to condemn their property because, they contend, they offered to donate their property under the statute, but were improperly refused. As an alternative proposition presented on appeal but not to the trial court, appellants contend the Government could not, consistent with due process and equal protection, condemn the property without first contacting them about the availability of the donative alternative to condemnation. Finding no issue of fact, the district court granted summary judgment against appellants' claim they made a timely offer to donate their property to the National Park Foundation. We affirm.

[1] The United States asserted that the landowners had not made any offer to the National Park Foundation prior to January 1, 1973 the cut-off date in the statute. Affidavits were submitted demonstrating the Foundation had no record whatsoever of any offer, written or oral, from the appellants. This evidence would have been admissible at trial, Fed. R.Evid. 803(7), and is "frequently the only way in which a negative fact may be proved." McClanahan v. United States, 292 F.2d 630, 637 (5th Cir.), cert. denied, 368 U.S. 913, 82 S.Ct. 193, 7 L.Ed.2d 130 (1961) (citations omitted).

In response, the appellants relied upon repetition of the unverified allegation contained in their answer, neither submitting their own affidavit nor suggesting other evidence that would show either one of them had made an offer to the Foundation prior to January 1, 1973. The law is clear that a party cannot rest on the allegations contained in his pleading in opposition to a properly supported

summary judgment motion made against him. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 1593, 20 L.Ed2d 569 (1968). Appellants did submit an affidavit of a relative indicating that a retired Park Service employee had made the following statement:

> About the summer of 1972, the Van Cleves said they wanted to make a deal with the National Park Foundation to stay on Cumberland, but I advised them that the Foundation had been dealing only with owners of large tracts and that they did not have a chance as the house was built after the cut-off date specified in the bill.

Appellants submitted the affidavit "merely as evidence as to [their] intent early on to deal with the National Park Foundation-not as evidence of the offer." Brief for Appellant at 11 (emphasis in the original). Viewed in the light most favorable to appellants with all reasonable doubt resolved in their favor, Poljer v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed2d 458 (1962), Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc., 479 F.2d 135 (5th Cir. 1973), such an affidavit is not evidence of an offer of the appellants' property to the Foundation. On this record, the district court properly determined there was no genuine issue of fact and granted summary judgment for the United States.

[2-4] Appellants argue an issue not raised or argued to the district court: that the National Park Foundation had a duty, dictated by due process and equal protection considerations, to approach small landowners as well as large landowners and inform them that a life estate might be retained through a donative agreement with the Foundation.

Generally, we do not consider issues not raised in the district court. Noritake Co., Inc. v. M/V HELLENIC CHAMPION, 627 F.2d 724, 732 (5th Cir. 1980). In any event, however, the landowners have failed to demonstrate any injury from the alleged breach of duty. The landowners claim they made an offer to donate. Such an assertion shows they were aware of their rights under the statute. They can claim no injury from any failure of the Government to publicize such rights. Cf. Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973), cert. denied, 415 U.S. 914, 94 S.Ct. 1410, 39 L.Ed.2d 468 (1974) (a party must show that he has suffered some direct and personal injury resulting from the violation of a right designed to protect that party).

AFFIRMED.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA,	*	CIVIL ACTION
VS.	*	NO. 277-20
34.60 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF CAMDEN, STATE OF GEORGIA, ELINOR T. GIOBBI, et al., AND UNKNOWN DEFENDANTS	*	U.S. District Court, Southern District of Ga. Filed in office 5:00 p.m. 11-10-78 /s/Lyneda T. Thomas Deputy Clerk

ORDER

In the above-styled condemnation action, the Government moves to strike all defenses in paragraphs 2(a), 2(b), 2(c), and 2(d) of the answers filed by defendants, Van Cleves, Potterfield and Read, as well as the defenses in paragraph 2(e) of the Van Cleves' answer. Alternatively, the Government moves for summary judgment on these defenses. The defendants' land is being taken pursuant to 16 U.S.C. §§ 459i through 459i-9, creating

the Cumberland Island National Seashore.

In paragraph 2(a) of each answer, the landowners state that the Government cannot take their land without first having complied with "conditions precedent established by the Environmental Protection Agency." The landowners cite no such "conditions precedent," and the Court is satisfied that none exists. Construing this defense as an allegation of the Government's non-compliance with the National Evironmental Policy Act, 42 U. S.C. § 4321 et seq., the motion to strike will be granted. Since this defense does not question whether the land is being taken for a congressionally authorized public use, it is not a sufficient defense to the taking. See United States v. 416.81 Acres of Land, 514 F. 2d 627, 631 (7th Cir. 1975); United States v. 255.25 Acres of Land, 553 F.2d 571, 572 n.2 (8th Cir. 1977). See also United States v. 178.15 Acres of Land, 543 F.2d 1391

(4th Cir. 1976).

Paragraph 2(b) of each answer challenges the authority of the Government to condemn land on Cumberland Island. The motion for summary judgment will be granted as to this defense. It is clear that the takings are congressionally authorized. See 16 U.S.C. § 459i-1 and 40 U.S. C. §257.

In paragraph 2(c) of the answers filed by the Potterfields and Reads, and paragraph 2(d) of the answer filed by the Van Cleves, the landowners allege that the Government has not condemned all privately owned property on Cumberland Island, but has arbitrarily and capriciously selected their land for condemnation, in violation of their rights under the Fifth Amendment. The Court construes these defenses as alleging a denial of equal protection, and based upon the record, summary judgment will be granted for the Government on

on these defenses. The Government has shown to the exclusion of all genuine issues of fact that it did not act arbitrarily in deciding to condemn the defendants' land, and that in this regard, the defendants have not without reason been treated differently from others similarly situated. The case at bar and the numerous other condemnation actions which are now pending in this Court involving the Cumberland Island National Seashore, attest to the fact that the Government has condemned many tracts of land on Cumberland Island.

The Court construes paragraph 2(c) of the Van Cleves' answer as a claim that under 16 U.S.C. § 459i-3, they are entitled to retain a right of use and occupancy in their house.[1]

---

[1] 16 U.S.C. §459i-3 provides in relevant part:

"(a) With the exception of any property deemed necessary by the Secretary for visitor facilities or administration of the seashore, any owner or owners of

improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for themselves and their successors or assigns a right of use and occupancy of the property for noncommercial residential purposes, for twenty-five years, or, in lieu thereof, for a term ending at the death of the owner or his spouse, whichever is later. . . "****"(c) The term "improved property", as used in this section shall mean a detached, noncommercial residential dwelling, the construction of which was begun before February 1, 1970 (hereinafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated."

The Van Cleves allege in paragraph 2(c) that they erected their residence on the tract in question "prior to the enactment of Public Law 92-536" creating the Cumberland Island National Seashore (October 23, 1972). However, the relevant date in this respect is February 1, 1970. 16 U.S.C. § 459i-3(c). The defendants conceded at the pretrial hearing of August 8, 1978, that construction

was not begun on their dwelling before February 1, 1970. Accordingly, the Government's motion for summary judgment is granted as to this defense.

In paragraph 2(e) of their answer, the Van Cleves allege that pursuant to the last clause of 16 U.S.C. § 459i-3(a), and prior to January 1, 1973, they offered to donate their land to the National Park Foundation, conditioned on their retention of a life estate in the land.[2] The Foundation is said to have rejected this offer, while accepting identical offers from similarly situated landowners on Cumberland Island. The Van Cleves

---

[2] The last clause of 16 U.S.C. § 459i-3(a) states:
"Provided further, That when acquiring lands, waters, and interests therein from the National Park Foundation, its successors and assigns, the Secretary shall acquire such lands, waters, and interests subject to the written terms and conditions contained in those transactions, including but not limited to options, entered into by the National Park Foundation prior to January 1, 1973, and that such previous written rights and interests shall prevail over provisions of this subsection."

allege, in effect, that the National Park Foundation should have accepted their offer, and it is clear that if it had done so, the Government could not take their retained life estate, 16 U.S.C. §459i-3(a). Thus, the Court cannot conclude that this defense is insufficient.

Of course, the National Park Foundation is not required to accept all donation offers, 16 U.S.C. § 19g. Here, the Foundation's decision to accept or reject an offer could determine whether a landowner will be able to retain any interest in his land, and in this situation, the Foundation could not arbitrarily and purposefully discriminate against one landowner by rejecting his offer, while accepting identical offers from other landowners. Compare Snowden v. Hughes, 321 U.S. 1 (1944).

The Government argues that the Foundation is a charitable and non-profit corporation, 16

U.S.C. § 19e, and cannot properly be characterized as an agency or arm of the Department of the Interior. The Court agrees, but concludes that the strictures of the Fifth Amendment are applicable. The National Park Foundation was created by an Act of Congress for the sole purpose of encouraging gifts of real and personal property to the National Park Service, 16 U.S.C. § 19e. The Foundation may utilize the services and facilities of the Department of Interior and Department of Justice without reimbursement, 16 U.S. C. § 19h, and contributions, gifts, or transfers to the Foundation are regarded as contributions, gifts, or transfers to the United States, 16 U.S.C. § 191. The Foundation is required to report to Congress at the end of each fiscal year, 16 U.S. C. § 19n.

It is obvious that the National Park Foundation was designed to function in close concert

with the National Park Service, and the two are closely entwined. Accordingly, the Court concludes that the Foundation is subject to the strictures of the Fifth Amendment when it exercises its discretion to accept or reject a donation offer. Compare Smith v. Young Men's Christian Association of Montgomery, Inc., 462 F.2d 634 (5th Cir. 1972); Duriso v. K-Mart No. 4195, Division of S. S. Kresge Co., 559 F.2d 1274 (5th Cir. 1977). In this context, the Constitution requires only that the Foundation act rationally and that it not act in an arbitrarily discriminatory manner. The Foundation is not required to accept all donation offers. To be entitled to summary judgment, the government must show either that the Van Cleves made no offer prior to January 1, 1973, or that the Foundation acted rationally in refusing the alleged offer.

The Court concludes that the Government

has not met its burden on the motion for summary judgment. It has shown that the Foundation never received a written offer to donate from the Van Cleves, and that such offers are customarily made in writing. See Affidavit of John L. Bryant, Jr., President of the National Park Foundation. Defendants allege that they did offer to donate their land and dwelling to the Foundation, conditioned on their retention of the land for life, or for twenty-five years. The Foundation is said to have refused even to discuss the matter. Defendants do not allege that they made a written offer to the Foundation, and the Government has not shown that donation offers are required by law to be in writing. No such requirement appears in the legislation creating the National Park Foundation 16 U.S.C. § 19e, et seq., or in 16 U.S.C. §459i-3. The Government has not shown to the exclusion of all genuine issues of material

fact that the Van Cleves did not offer to donate their land to the Foundation prior to January 1, 1973. Compare Adickes v. S. H. Kress & Co., 398 U. S. 144, 159-161 (1970).

Nor has the Government shown why the alleged offer was rejected. On this record, the Government is not entitled to summary judgment on paragraph 2(e) of the Van Cleves' complaint.

Paragraph 2(d) of the answers filed by defendants, Potterfield and Read, alleges that as a "condition precedent" to the plaintiff's right to take their land, it must engage with them in "good faith settlement negotiations." The defendants allege that the Government has failed to do this. The motion to strike will be granted as to these defenses. See 42 U.S.C. §§ 4651 and 4602 (a).

In sum, as to the answers filed by defendants, Potterfield and Read, the Government's motion to strike is granted as to paragraphs 2(a) and 2(d),

and its motion for summary judgment is granted as to paragraphs 2(b) and 2(c). Turning to the answer filed by the Van Cleves, the motion to strike is granted as to paragraph 2(a), and the motion for summary judgment is granted as to paragraphs 2(b), 2(c), and 2(d). The Government's motions are denied as to paragraph 2(e) of the Van Cleves' answer.

So Ordered, this 10th day of November, 1978.

/s/ Anthony A. Alaimo
Chief Judge, United States District Court, Southern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA	*	CIVIL ACTION
Plaintiffs	*	NO. 277-20
VS	*	U. S. District Court, Southern
34.60 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF CAMDEN, STATE OF GEORGIA, ELINOR T. GIOBBI, ET AL., AND UNKNOWN DEFENDANTS,	*	District of Ga. Filed in office 10:25 a.m. Nov. 29, 1978 /s/ H. R. Crumley
Defendants	*	Deputy Clerk

ORDER

The above-styled action is presently before the Court on the government's motion for reconsideration of that position of the Court's Order of November 10, 1978, which denied the government's motion to strike and alternative motion for summary judgment as to paragraph 2(e) of the answer filed by the Van Cleves.

The government has now shown that the Van

Cleves made no oral or written donation offer to the National Park Foundation prior to January 1, 1973. See 16 U.S.C. § 459i-3; Affidavit of John L. Bryant, Jr., President of the National Park Foundation.

The condemnees have failed to set forth any facts showing that there is a genuine issue for trial on this crucial point. See Rule 56(e), Fed. R. Civ. P. In fact, the affidavit filed by the Van Cleves supports the government's proof to the effect that these landowners never approached the National Park Foundation with an offer to donate. Accordingly, the government's motion for reconsideration is hereby granted. Summary judgment is granted for the government on paragraph 2(e) of the Van Cleves' answer.

So Ordered, this 29th day of November, 1978.

/s/ Anthony A. Alaimo
Chief Judge, United States
District Court, Southern
District of Georgia

GOVERNMENT
EXHIBIT
A

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. CV277-20
34.60 ACRES OF LAND, MORE	)	
OR LESS, IN THE COUNTY OF	)	TRACT NO.: 02-165,
CAMDEN, STATE OF GEORGIA	)	formerly 02-127
ELINOR T. GIOBBI, ET AL.,	)	(Robert B. Van Cleve,
AND UNKNOWN DEFENDANTS,	)	et ux)
	)	
Defendants.	)	

A F F I D A V I T

Affiant, John L. Bryant, Jr., being first duly sworn, deposes and states as follows:

1. Affiant is the President of the National Park Foundation, a non-profit, charitable, tax-exempt foundation chartered by the United States Congress in 1967 under Public Law 90-209 for the purpose of encouraging private gifts of real and personal property for the benefit of the National Park Service. Offers to donate real

property are made in writing for consideration by The Foundation.

2. As President of the National Park Foundation, affiant has custody, care, control and access to all of the original records and correspondence files of the said Foundation;

3. Affiant has caused a diligent search of the records and correspondence files of The National Park Foundation to be made with reference to an alleged offer by the defendants, Robert B. Van Cleve (a/k/a Robert Baldwin Van Cleve) and Sarah T. Van Cleve, his wife, to give and donate property owned by them on Cumberland Island, Camden County, Georgia, to the said Foundation;

4. As a result of said search of the records and correspondence files of the said Foundation, affiant states that there is no correspondence of any kind or import in its files from the defendants, Robert B. Van Cleve and Sarah T. Van Cleve, to The National Park Foundation;

5. Further, affiant sayeth not.

/s/ John L. Bryant, Jr.
John L. Bryant, Jr.

S E A L

Subscribed to and sworn before me
this 25th day of September, 1978.
Notary Public ELEANOR K. RESIR
My commission expires: May 14, 1982

GOVERNMENT
EXHIBIT
A

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. CV277-20
34.60 ACRES OF LAND, MORE	)	
OR LESS, IN THE COUNTY OF	)	TRACT NO.: 02-165,
CAMDEN, STATE OF GEORGIA	)	formerly 02-127
ELINOR T. GIOBBI, ET AL.,	)	(Robert B. Van Cleve,
AND UNKNOWN DEFENDANTS,	)	et ux)
	)	
Defendants.	)	

S U P P L E M E N T A L
A F F I D A V I T

Affiant, John L. Bryant, Jr., being first duly sworn, deposes and states as follows:

1. Affiant is the President of the National Park Foundation, a non-profit, charitable, tax-exempt foundation chartered by the United States Congress in 1967 under Public Law 90-209 for the purpose of encouraging private gifts of real and personal property for the benefit of the National Park Service.

2. As President of the National Park Foundation, affiant has custody, care, control and access to all of the original records and correspondence files of the said Foundation;

3. Affiant has caused a diligent search of the records and correspondence files of The National Park Foundation to be made with reference to an alleged offer by the defendants, Robert B. Van Cleve (a/k/a Robert Baldwin Van Cleve) and Sarah T. Van Cleve, his wife, to give and donate property owned by them on Cumberland Island, Camden County, Georgia, to the said Foundation;

4. As a result of said search of the records and correspondence files of the said Foundation, affiant states that there is no memoranda, notations or any other evidence in said files reflecting any offer, written or oral, from the defendants, Robert B. Van Cleve and Sarah T. Van Cleve, to the National Park Foundation;

5. This affidavit supplements affiant's

previous affidavit given by him in this cause on this matter.

6. Further, affiant sayeth not.

/s/ John L. Bryant, Jr.
John L. Bryant, Jr.

S E A L

Subscribed to and sworn before me
this 25th day of September, 1978.

Notary Public ELEANOR K. RESIR

My commission expires: May 14, 1982

Respectfully submitted,
Sarah T. Van Cleve

Office-Supreme Court, U.S.
FILED
AUG 7 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2050

In the Supreme Court of the United States

OCTOBER TERM, 1980

SARAH T. VAN CLEVE, ET VIR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ANNE S. ALMY
MARTIN W. MATZEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the government's affidavits were sufficient to support summary judgment under Fed. R. Civ. P. 56.

2. Whether the National Park Foundation's failure to advise petitioners of the opportunity to negotiate an agreement with it pursuant to 16 U.S.C. 459i-3(a), violated the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2050

SARAH T. VAN CLEVE, ET VIR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-iii) is reported at 642 F.2d 788. The orders of the district court of November 10, 1978 (Pet. App. iv-ix), and of November 29, 1978 (Pet. App. x), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1981. The petition for a writ of certiorari was filed on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 4 of the Act of Oct. 23, 1972, Pub. L. No. 92-536, 86 Stat. 1066, 16 U.S.C. 459i-3, provides in pertinent part:

> (a) With the exception of any property deemed necessary by the Secretary for visitor facilities or administration of the seashore, any owner or owners of improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for themselves and their successors or assigns a right of use and occupancy of the property for noncommercial residential purposes, for twenty-five years, or, in lieu thereof, for a term ending at the death of the owner or his spouse, whichever is later. The owner shall elect the term to be reserved. The Secretary shall pay to the owner the fair market value of the property on the date of such acquisition less the fair market value on such date of the right retained by the owner: * * * *Provided further*, That when acquiring lands, waters, and interests therein from the National Park Foundation, its successors and assigns, the Secretary shall acquire such lands, waters, and interests subject to the written terms and conditions contained in those transactions, including but not limited to options, entered into by the National Park Foundation prior to January 1, 1973, and that such previous written rights and interests shall prevail over provisions of this subsection.
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> (c) The term "improved property," as used in this section shall mean a detached, noncommercial residential dwelling, the construction of which was begun before February 1, 1970 (hereinafter referred to as "dwelling"), together with

so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling * * *.

STATEMENT

This case arises from a civil action brought by the United States to condemn for public use as part of the Cumberland Island National Seashore petitioners' property located on Cumberland Island in Camden County, Georgia.[1] Petitioners do not challenge the amount received as just compensation, but rather the government's right to take their property at all.

In creating the Seashore, Congress provided that landowners could retain rights of use and occupancy in the tracts acquired for public use either (1) if the property had been "improved" by "a detached, noncommercial residential dwelling, the construction of which was begun before February 1, 1970 * * *" (16 U.S.C. 459i-3(c));[2] or (2) if such provisions were included in the written terms of transactions "entered into by the National Park Foundation prior to January 1, 1973 * * *." 16 U.S.C. 459i-3(a).[3]

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[1] The Act of Oct. 23, 1972, Pub. L. No. 92-536, 86 Stat. 1066, 16 U.S.C. 459i *et seq.*, established the Cumberland Island National Seashore and authorized acquisition of lands within its boundaries by the Secretary of the Interior.

[2] The rights that could be retained by owners of "improved property" were limited to a term of twenty-five years, "or, in lieu thereof, for a term ending at the death of the owner or his spouse, whichever is later." 16 U.S.C. 459i-3(a).

[3] The National Park Foundation was established in 1967 as the successor to the National Park Trust Fund. Pub. L. No. 90-209, 81 Stat. 656, 16 U.S.C. 19e *et seq.* Its purpose is

Invoking these provisions, petitioners contested the condemnation of their property. They conceded that they failed to qualify under the first provision because they had not begun construction of their residence prior to February 1970 (see Pet. 6). However, they alleged that they should have been permitted to retain the use of their property under the second provision because they had made an offer to donate the property to the Foundation and the Foundation had rejected that offer in an arbitrary and discriminatory fashion violative of the Fifth Amendment (Pet. 9-10).

The United States moved for summary judgment on this issue and supported its motion with affidavits (Pet. App. xxi-xxiv) stating that a search of the files revealed that the Foundation had no record of any such offer from petitioners, oral or written. Petitioners came forward with no evidence, by affidavit or otherwise, that a timely offer was made.[4] Accordingly, the district court held (Pet. App. x) that petitioners had failed to set forth any facts showing the existence of a genuine issue for trial

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to encourage private gifts of real and personal property * * * for the benefit of, or in connection with, the National Park Service, its activities, or its services, and thereby to further the conservation of natural, scenic, historic * * * or recreational resources for future generations of Americans * * *.

16 U.S.C. 19e. Lands acquired by the Foundation on Cumberland Island were to be "donated to the United States subject to the rights reserved by the previous owners * * *." H.R. Rep. No. 92-1405, 92d Cong., 2d Sess. 7 (1972); see 16 U.S.C. 459i-3(a).

[4] Petitioners were represented by counsel throughout the district court proceedings that culminated in summary judgment.

and granted partial summary judgment in favor of the government pursuant to Fed. R. Civ. P. 56(e). A trial was then held on the issue of just compensation, and a final judgment entered.

The court of appeals affirmed (Pet. App. i-iii). It held that, on the record before it, the district court correctly granted the motion for summary judgment. In addition, the court of appeals rejected petitioners' contention, raised for the first time on appeal, that the Foundation had a constitutional duty to notify small landowners of the option to enter into an agreement with the Foundation for the retention of a life estate. Apart from the fact that this issue had not been raised below, the court explained that petitioners could not have been injured by the alleged breach of duty because they were, in fact, aware of this option.

ARGUMENT

1. Petitioner contends (Pet. 13-28) that the district court erred in granting summary judgment based on the record before it. This contention is without merit.

It is settled that when a motion for summary judgment is made and supported as required by Fed. R. Civ. P. 56, the opposing party must come forward with specific facts showing a genuine issue for trial. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 159-161 & nn. 19, 20 (1970); *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 288-290 (1968). As both courts below correctly concluded (Pet. App. ii-iii, x), petitioners failed to do so.

The government submitted affidavits negating the existence of any record at the Foundation of any offer from petitioners, written or oral. Despite their unique access to the specific facts surrounding the

making and rejection of their alleged offer, petitioners, who were then represented by counsel, did not take the simple step of producing the sworn statement of whichever of them had made, or had personal knowledge of, the offer.[5] By its terms, Rule 56(e) required the result reached here.

Petitioners' primary contention here, not previously raised, goes to the form of the government's affidavits, rather than their substance. They contend that the affidavits submitted by the government were insufficient because they were not made on the personal knowledge of the affiant and hence did not satisfy the formal requirements of Fed. R. Civ. P. 56(e).[6] Ordinarily, such an objection to the form of an affidavit is waived if no motion is made to strike the affidavit (see 6 *Moore's Federal Practice* ¶ 56.22[1], at 1330 (2d ed. 1980); C. Wright & A. Miller, *Federal Practice and Procedure* § 2738, at 706 (1973)), and this contention certainly is not properly before this Court.[7] In any event, it is without foundation.

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[5] Petitioners relied primarily on mere repetition of the general, unverified allegations in their answer. As the court of appeals held (Pet. App. ii), this was plainly insufficient under Rule 56(e). See, *e.g.*, *Adickes* v. *Kress & Co.*, *supra*, 398 U.S. at 159 n.20. Also insufficient was a relative's affidavit concededly submitted as evidence of petitioners' "intent" to deal with the Foundation, " 'not as evidence of *the* offer.' " See Pet. App. ii-iii (emphasis in original).

[6] Rule 56(e) requires that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

[7] This Court ordinarily will not consider issues not raised in the courts below, especially where, as here, a timely objec-

Both of the affidavits in question (Pet. App. xxi, xxiii) tracked the requirements of Fed. R. Civ. P. 44(b) and Fed. R. Evid. 803(10) for proving the absence of a public record or entry, *i.e.*, that no such record had been found "after diligent search." The failure of the affiant personally to perform the search does not, as petitioners urge (Pet. 18), mean he lacks "personal knowledge" within the meaning of Fed. R. Civ. P. 56(e). As one leading commentator has noted in connection with the general application of the personal knowledge requirement to testimony about records: "It is proper for [the affiant] to rely on a government colleague or subordinate; *the personal knowledge requirement will be fulfilled if the other government employee has the requisite knowledge.*" 4 *Weinstein's Evidence* ¶ 803(8)[02], at 196 (1979) (emphasis supplied). In addition, Fed. R. Evid. 803(6) equates a "person with knowledge" of the records with the custodian. See S. Rep. No. 93-1277, 93d Cong., 2d Sess. 17 (1974). As President of the Foundation and custodian of its records, the affiant here was plainly competent to testify that the Foundation lacked any record of an offer from petitioners.[8]

2. Petitioners also contend (Pet. 28-33) that the National Park Foundation was constitutionally required to "affirmatively contact" (Pet. 30) all landowners with respect to the possibility of negotiating

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tion below could have permitted the other party to remedy any defect. See *First National Bank* v. *Cities Service Co.*, *supra*, 391 U.S. at 280-281 nn. 16, 17.

[8] The cases cited by petitioners (Pet. 17-18) as in conflict with this case are inapposite. This is not a case where the affidavit reflects the affiant's opinion or is based "on information and belief."

with the Foundation for reservation of use and occupancy of their properties.[9] As the court of appeals noted (Pet. App. iii), this issue was not raised or argued in the district court. It is therefore not properly presented to this Court. See note 7, *supra*.

In any event, the court of appeals correctly rejected this contention (Pet. App. iii). Because petitioners have always asserted their actual awareness of the option of dealing with the Foundation, they cannot have been harmed by the alleged breach of duty.[10] Moreover, nothing in the language or legislative history of the Act creating the Foundation and the Seashore suggests that Congress intended to impose on the Foundation the duty to "affirmatively contact" every landowner within the boundaries of the Seashore, nor does the Constitution impose any such duty.

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[9] Petitioners' suggestions (Pet. 7, 8, 30) that the Foundation put special effort into reaching agreements for the acquisition of the Carnegie estate warrant no negative inference. The Carnegie holdings once amounted to almost 90% of Cumberland Island's acreage. See *First National Bank* v. *United States*, 350 F.2d 606, 607 (5th Cir. 1965).

[10] Petitioners' suggestion (Pet. 32) that they were harmed because they were not given "precise instructions" as to how to make an offer acceptable to the Foundation is effectively a reiteration of their first contention that they made an offer that was arbitrarily refused, and it is without merit for the reasons stated above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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